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SOUTHERN HRC SDN BHD v. DANIELI CO LTD

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN JC
[ORIGINATING SUMMONS NO: WA-24NCC(ARB)-14-03-2022]
31 OCTOBER 2022

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Abstract – *From the strict reading of the provisions of Arbitration Act 2005 ('Act'), it is clear that the Malaysian courts are precluded from granting orders relating to the enforcement of or the challenge to sums due under foreign arbitral awards outside of the specific powers granted under the Act. The Act is a complete and comprehensive statute which exhaustively and exclusively sets out the court's jurisdiction in respect of all matters relating to the registration and enforcement of arbitral awards, including foreign arbitral awards. This court has limited jurisdiction to grant any relief beyond that which is provided for under the Act.*

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ARBITRATION: *Award – Foreign award – Jurisdiction – Recognition and enforcement of – Whether Malaysian courts precluded from granting orders relating to enforcement of or challenge to sums due under foreign arbitral awards – Whether plaintiff could restrain defendant from its legal right to apply to court for award to be recognised – Applicability of maxim of generalis specialibus non derogant – Whether defendant entitled to apply to court to have award recognised under s. 38 of Arbitration Act 2005*

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CIVIL PROCEDURE: *Originating summons – Setting aside – Application for – – Whether court precluded by Arbitration Act 2005 from granting reliefs sought by plaintiff in originating summons – Whether court has jurisdiction to hear originating summons – Specific Relief Act 1950, ss. 41 & 42 – Arbitration Act 2005, s. 38*

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This was an application by the defendant pursuant to O. 28 r. 3B(1) of the Rules of Court 2012 ('ROC') to, essentially, seek declaratory orders and to set aside and/or strike out this action, the originating summons (encl. 6) ('this application'). There were disputes between the plaintiff and the defendant under a sale contract ('agreement') and the dispute was then referred to arbitration in Singapore. After a full hearing in Singapore, a final award was issued by the arbitrator, pursuant to which the arbitrator allowed the defendant's claim against the plaintiff ('DT award'). The defendant filed originating summons ('OS 49') to recognise the DT award on the basis that the plaintiff had failed and/or refused to comply with the DT award. The plaintiff was opposing OS 49. The plaintiff filed the originating summons herein for, *inter alia*, a declaration that (i) the plaintiff and the defendant have agreed to set off the sums due to the plaintiff under another final award also

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dated 28 November 2019, between Danieli & Officine Meccaniche S.P.A ('Danieli Italy') and Danieli Malaysia Sdn Bhd ('Danieli Malaysia') as claimants and the plaintiff herein as the respondent ('DI award'), against the sums due to the defendant under the DT award ('agreement to set off'); (ii) as a result of the agreement to set off, nothing was due and owing to the defendant under the DT award. The plaintiff also sought an injunction to restrain the defendant from recognising and enforcing the DT award in any manner whatsoever. The issue of the set off and the agreement to set off was a matter of contention between the parties and was the main subject matter of the originating summons. The defendant filed this application on the following main grounds: (i) this court was precluded by the Arbitration Act 2005 ('Arbitration Act') from granting the reliefs sought by the plaintiff in the originating summons; and (ii) this court did not have the jurisdiction to hear the originating summons.

Held (allowing prayers 1 and 2 of this application):

(1) From the strict reading of the Arbitration Act provisions, it is clear that the Malaysian courts are precluded by the Arbitration Act from granting orders relating to the enforcement of or the challenge to sums due under foreign arbitral awards outside of the specific powers granted under the Arbitration Act. This is because the Arbitration Act is a complete and comprehensive statute which exhaustively and exclusively sets out the court's jurisdiction in respect of all matters relating to the registration and enforcement of arbitral awards, including foreign arbitral awards. This court has limited jurisdiction to grant any relief beyond that which is provided for under the Arbitration Act. (para 18)

(2) All the arguments raised herein revolved around one central question: whether the plaintiff could restrain the defendant from recognising and enforcing the DT award in any manner whatsoever. The net effect of the reliefs sought by the plaintiff was to restrain the defendant from proceeding with the defendant's application to recognise the DT award in OS 49. This court's short answer to this question was in the negative. The plaintiff could not restrain the defendant from its legal right to apply to the court for the DT award to be recognised. Thus, the plaintiff had no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in this action. (paras 15-17)

(3) Sections 41 and 42 of the Specific Relief Act 1950 on which the originating summons was based only concerns the general power of the court to make declaratory orders. It does not clothe the court with jurisdiction to make declaratory orders in all situations. In particular with regards to the present case where there are specific provisions under the Arbitration Act which govern the court's jurisdiction to make such orders. The maxim *generalis specialibus non derogant* is applicable.

A The specific provision prevails over the general provision. Since the subject matter of the plaintiff's claim in the originating summons and the reliefs sought are in relation to the agreement to set off, DT award and DI award, the reliefs sought must come within the purview of the Arbitration Act. However, the originating summons is not premised on
B any of the Arbitration Act provisions. Thus, the court has no jurisdiction to grant the reliefs sought in the originating summons. (paras 28-30)

(4) The originating summons essentially sought to injunct OS 49 and declarations that the sums due under the DT award are not in fact due. The Arbitration Act does not permit such remedy. The only post award
C remedy that this court had jurisdiction to grant in the Arbitration Act is in s. 38. Thus, the defendant could not be curtailed by the originating summons from applying to the court for the DT award to be recognised. (paras 31 & 32)

D **(5)** The defendant could not be restrained from exercising its legal right to recognise and enforce the DT award. The defendant was entitled to apply to court *via* OS 49 to have the DT award recognised under s. 38 of the Arbitration Act. The merits of OS 49 have yet been determined. Similarly, the plaintiff was entitled to challenge OS 49. Whether or not the plaintiff's challenge can come under s. 39 of the Arbitration Act is
E no ground to prevent the defendant from even applying to have the DT award recognised. (paras 37 & 38)

Case(s) referred to:

AV Asia Sdn Bhd v. Pengarah Kuala Lumpur Regional Centre For Arbitration & Anor [2013] 10 CLJ 115 HC ***(refd)***

F *Danieli & C Officine Mecchaniche SpA v. Southern HRC Sdn Bhd [2021] 5 CLJ 71 HC* ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd [2015] 6 CLJ 649 HC ***(refd)***

G *Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd [2016] 5 CLJ 746 CA* ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 38, 39

Courts of Judicature Act 1964, s. 23(1)

Rules of Court 2012, O. 18 r. 19, O. 28 r. 3B(1), O. 69

Specific Relief Act 1950, ss. 41, 42

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For the plaintiff - Nitin Nadkarni, Andrew Chiew & Colin Yoong; M/s Lee Hishamuddin Allen & Gledhill

For the defendant - Shanti Mogan, Lilien Wong & Yiew De Quan; M/s Shearn Delamore & Co

I *Reported by Suhainah Wahiduddin*

JUDGMENT
(encl. 6)

Wan Muhammad Amin JC:

[1] This was an application by the defendant pursuant to O. 28 r. 3B(1) of the Rules of Court 2012 ("ROC") to essentially seek declaratory orders and to set aside and/or strike out this action, the originating summons dated 24 January 2022 (encl. 6) ("this application").

[2] In this application, the defendant sought to declare that this court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the originating summons (encl. 1).

[3] Learned counsel for the defendant submitted that for the purpose of this application, she will not be arguing the merits of the originating summons and will only focus on the issue of jurisdiction.

[4] Therefore, I determined this application based on the jurisdictional issue which is centred upon one main question of law.

Salient Background Facts

[5] The background facts relied on by the defendant in this application were not disputed. They are as stated below.

[6] There were disputes between the plaintiff and the defendant under a sale contract dated 24 December 2013 ("agreement") and the dispute was then referred to arbitration in Singapore.

[7] After a full hearing in Singapore, in which both the plaintiff and the defendant fully participated, a final award was issued by the arbitrator on 28 November 2019, pursuant to which the arbitrator allowed the defendant's claim against the plaintiff ("DT award").

[8] The defendant then, on 6 December 2022, filed Kuala Lumpur High Court Originating Summons No. WA-24NCC(ARB)-49-12-2021 ("OS 49") to recognise the DT award on the basis that the plaintiff has failed and/or refused to comply with the DT award. The plaintiff is opposing OS 49.

[9] On 24 January 2022, the plaintiff filed the originating summons herein for, *inter alia*, a declaration that:

(i) the plaintiff and the defendant have agreed to set off the sums due to the plaintiff under another final award also dated 28 November 2019, between Danieli & Officine Meccaniche SPA ("Danieli Italy") and Danieli Malaysia Sdn Bhd ("Danieli Malaysia") as claimants and the plaintiff herein as the respondent ("DI award"), against the sums due to the defendant under the DT award ("agreement to set off");

(ii) as a result of the agreement to set off, nothing is due and owing to the defendant under the DT award.

[10] The plaintiff also sought an injunction to restrain the defendant from recognising and enforcing the DT award in any manner whatsoever.

[11] The issue of the set off and the agreement to set off is a matter of contention between the parties and is the main subject matter of the originating summons.

[12] The defendant filed this application on the following main grounds:

(i) this court is precluded by the Arbitration Act 2005 ("Arbitration Act") from granting the reliefs sought by the plaintiff in the originating summons; and

(ii) this court does not have the jurisdiction to hear the originating summons.

Whether The Arbitration Act 2005 Precludes This Court From Granting The Reliefs Sought By The Plaintiff

[13] Before I deal with the Arbitration Act, it is important to bear in mind that this application cannot be equated to a striking out application under, for example, O. 18 r. 19 ROC and the principles applicable thereto. It is a jurisdictional challenge under O. 28 r. 3B(1) ROC which provides as follows:

> **3B. Dispute as to jurisdiction (O. 28 r. 3B)**
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> (1) A defendant who wishes to **dispute the jurisdiction of the Court** in the proceedings by reason of any irregularity in the originating summons or service thereof or in any order giving leave to serve the originating summons out of the jurisdiction or extending the validity of the originating summons for the purpose of service or **on any other ground** shall, within twenty-one days after the service of the originating summons and supporting affidavit or affidavits on him, apply to the Court for:
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> (g) a declaration that in the circumstances of the case **the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action**; or
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> (h) **such other relief as may be appropriate.**
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> (emphasis added)

[14] In support of this applicant the defendant relies on the following provisions of the Arbitration Act:

(i) Section 8 of the Arbitration Act

> No court shall intervene in matters governed by this Act, **except where so provided in this Act**

(ii) The Preamble to the Arbitration Act

> An Act to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and **for related matters**.
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> (emphasis added)

[15] Both learned counsel for the defendant and the plaintiff have gone to great lengths to submit orally and in writing on this issue of jurisdiction. However, with respect to both counsels, I am of the considered view that all the arguments raised revolve around one central question: whether the plaintiff can restrain the defendant from recognising and enforcing the DT award in any manner whatsoever. The net effect of the reliefs sought by the plaintiff is to restrain the defendant from proceeding with the defendant's application to recognise the DT award in OS 49.

[16] My short answer to this question is in the negative.

[17] Simply put, the plaintiff cannot restrain the defendant from its legal right to apply to the court for the DT award to be recognised. Thus, the plaintiff has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in this action.

[18] It was submitted by learned counsel for the defendant that from the strict reading of the Arbitration Act provisions above, it is clear that the Malaysian courts are precluded by the Arbitration Act from granting orders relating to the enforcement of or the challenge to sums due under foreign arbitral awards outside of the specific powers granted under the Arbitration Act. This is because the Arbitration Act is a complete and comprehensive statute which exhaustively and exclusively sets out the court's jurisdiction in respect of all matters relating to the registration and enforcement of arbitral awards, including foreign arbitral awards.

[19] I agree with learned counsel for the defendant's above submissions. This court has limited jurisdiction to grant any relief beyond that which is provided for under the Arbitration Act.

[20] An application similar to this application was made in the case of *Danieli & C Officine Mecchaniche SpA v. Southern HRC Sdn Bhd* [2021] 5 CLJ 71; [2021] 10 MLJ 48 which involve Danieli Italy (as the plaintiff) and the plaintiff herein (as the defendant) with regards to the DI award.

[21] In *Danieli & C Officine* (*supra*), Danieli Italy based on the DI award, requested access to the plaintiff's site to inspect the plant to determine its status as well as integrity and ability to operate. In response, the plaintiff took the position that they would only give Danieli Italy access to the plant subject to them paying the award sum. Danieli Italy, on the contrary, took the position that their access to the site could not be conditional on the payment

of the award sum. This then led to the filing of the action where Danieli Italy sought, *inter alia*, a declaration that they are entitled to inspect the plant and consequential orders based on the DI award.

[22] Before the case was heard, the plaintiff filed an application under, *inter alia*, O. 28 r. 3B(1) ROC for a declaration that the court has no jurisdiction over the plaintiff in respect of the remedy sought by the Danieli Italy and for an order that the Danieli Italy's originating summons be struck off.

[23] The plaintiff clearly took the defendant's position in *Danieli & C Officine* (*supra*) but is now arguing the opposite. In allowing the plaintiff's application the High Court held, *inter alia*, as follows:

> [34] Hence, it is the defendant s contention that in respect of matters that fall within the ambit of AA 2005, **the court has no jurisdiction, whether inherent or express, other than that expressly provided for in the Ac**t. The explanatory notes referred to above clearly fortifies the defendant's contention. In relation to the specific words 'governed by this act' in s. 8, the defendant highlights that s. 51(4) refers to the exact same words. It is thus submitted that upon reading the two sections together, as end 1 relates to an arbitration commenced after the commencement of the Act, **then this court cannot intervene save where provided for in the Act**.
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> [42] In this regard, the defendant submits that the cause of action created by an arbitral award is the right to recognise and enforce it by entry as a judgment of the High Court. **This was clearly an option open to the plaintiff under s. 38 of the AA 2005 and utilising the procedure in O. 69 of the ROC**. Reliance for this proposition was placed on cases such as *Malayan Flour Mill Bhd v. Raja Lope & Tan Co* [2000] 6 MLJ 591 as well as *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316.
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> [43] The defendant also relies on the decision in *Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd* [2016] 2 MLJ 660 where the Court of Appeal when dealing with a Singapore arbitral award held **that the court in Malaysia is purely an enforcement court and must recognise a valid arbitration award**.
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> [44] Similarly, in the case of *Hiap-Taih Welding & Construction Sdn Bhd v. Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471, David Wong J (as His Lordship then was) had occasion to examine what was a parties cause of action once an arbitration award has been handed down wherein His Lordship concluded that **the award itself does not give rise to a cause of action but that the cause of action is to enforce the award**.
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> (emphasis added)

[24] I note that learned counsel for the plaintiff had attempted to distinguish the *Danieli & C Officine* (*supra*). Whilst there is some difference in the facts of *Danieli & C Officine* (*supra*) and the present case, the central issue is that of jurisdiction which is the same as it is here. The main difference there was the fact that the originating summons was argued to tantamount to an application to enforce the DI award. The court did not agree with this argument and held that the reliefs prayed for in the originating summons was indeed a court proceeding relating to arbitration and as such s. 8 of the Arbitration Act is applicable so as to prohibit intervention of the court.

[25] From the intitulement of the originating summons, it can be seen that the plaintiff is relying on substantially ss. 41 and 42, Specific Relief Act 1950. The plaintiff was clearly not relying on any provision of the Arbitration Act or even O. 69 ROC which govern arbitration proceedings. Nevertheless, the DT award and DI award were stated in the intitulement and is a subject matter of the originating summons.

[26] Therefore, it is clear to me that the subject matter and reliefs in originating summons were in relation to the DT award and DI award. However, the originating summons was not pursuant to or based on any of the provisions of the Arbitration Act. This is notwithstanding the fact that the court cannot intervene in matters governed by the Arbitration Act except where so provided in the Act.

[27] In this regard, the Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 listed out the applicable provisions of the Arbitration Act in which the court has jurisdiction to intervene:

> [114] AA 2005 is devoid of a provision in the words of s. 81(2) of the UK Arbitration Act 1996. *But the AA 2005 is nonetheless clear that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', Pertinent to 'where so provided in this Act', the AA 2005 provides for court intervention in the matters statedin ss. 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45, and 46 of the AA 2005*. 'Where a party seeks intervention is *one of those situations*, the court is permitted to intervene only in the manner prescribed by the model law, and in the absence of any express provision the court must not intervene at all. By contrast, where the situation is not of a type to which the model law is addressed, the court may intervene or decline to intervene in accordance with the provisions of the relevant domestic arbitration law' (*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus, published in 1994 at p 224). Accordingly, s. 8 'would ... not exclude court intervention in any matter not regulated by (the AA 2005)' (The Arbitration Act 2005 at p 8.17); matters which are not go verned by the Model Law include the following areas: the inherent jurisdiction in the court to grant an

injunction to stay arbitral proceedings; and the whole topic of confidentiality of arbitral proceedings (for a non-exhaustive list of matters not governed by the Model Law, see *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* at p 218).

[115] But ' ...' in situations expressly regulated by the Act, **the courts should only intervene where so provided in the Act** ... (*LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57 per Sundaresh Menon JA, as he then was, delivering the judgment of the court). Since the setting aside of an award is a matter governed by the AA 2005, the court is permitted to set aside an award only in manner prescribed by the A A 2005. **The court is not permitted to set aside an award in manner not prescribed by the AA 2005**. 'Error of fact or law on the face of the award' is not prescribed as a ground for court intervention. Hence, under the AA 2005, there is no jurisdiction to set aside an award on the ground of error of fact or law on the face of the award'. It is accepted that under the AA 1952, the jurisdiction for court intervention stemmed from both common law and statute. **But under the AA 2005, 'the common law ground of setting aside an award for error on the face of the award' no longer exists'** (The Arbitration Act at p 8.23(b)).

(emphasis added)

[28] Sections 41 and 42 of the Specific Relief Act 1950 on which the originating summons was based only concerns the general power of the court to make declaratory orders. It does not clothe the court with jurisdiction to make declaratory orders in all situations. In particular with regards to the present case where there are specific provisions under the Arbitration Act which govern the court's jurisdiction to make such orders. The maxim *generalis specialibus non derogant* is applicable though I do not find the above provisions of the Specific Reliefs Act 1950 to be in conflict with the Arbitration Act. The point is that the specific provision prevails over the general provision.

[29] Since the subject matter of the plaintiff's claim in the originating summons and the reliefs sought are in relation to the agreement to set off, DT award and DI award, they reliefs sought must come within the purview of the Arbitration Act. However, the originating summons is not premised on any of the Arbitration Act provisions. Thus, the court has no jurisdiction grant the reliefs sought in the originating summons.

[30] In opposing this application, learned counsel for the plaintiff had delved into the merits of the originating summons in particular regarding the agreement to set off and the reason the plaintiff claims the DT award cannot be recognised and enforced. However, the merits of the originating summons are not relevant to this application especially given that the defendant's challenge is only on the issue of the court's jurisdiction. That being the case, I have not taken those arguments into consideration.

[31] The originating summons essentially sought to injunct OS 49 and declarations that the sums due under the DT award are not in fact due. The Arbitration Act does not permit such a remedy. The only post-award remedy that this court has jurisdiction to grant in the Arbitration Act is in s. 38. In *Danieli & C Officine* (*supra*) it was held as follows:

> [53] The plaintiff has also submitted that s. 8 is to facilitate arbitration proceedings, not to limit the courts jurisdiction. Whilst I would agree that it is to facilitate arbitration proceedings, in my view, it mainly is to facilitate the same before or during the arbitral proceedings. In so far as once an award is handed down, the courts facilitation is limited to recognition and enforcement. **In this regard, I am in agreement with the defendant's contention that apart from s. 38, the court cannot grant any other relief in respect of a foreign award**.
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> (emphasis added)

(see also *AV Asia Sdn Bhd v. Pengarah Kuala Lumpur Regional Centre For Arbitration & Anor* [2013] 10 CLJ 115; *Sintrans Asia Services Pte Ltd v. Inai Kiara Sdn Bhd* [2016] 5 CLJ 746; [2016] 2 MLJ 660; *Murray & Roberts Australia Pty Ltd v. Earth Support Company (SEA) Sdn Bhd* [2015] 6 CLJ 649; [2015] MLJU 2319 – on the court's limited jurisdiction to deal with foreign arbitral proceedings).

[32] Thus, the defendant cannot be curtailed by the originating summons from applying to the court for the DT award to be recognised.

Whether The Court Has Territorial Jurisdiction To Hear The Originating Summons

[33] Learned counsel for the defendant argued that this court also does not have jurisdiction to hear the originating summons as the action does not fall within any of the limbs of s. 23(1) of the Courts of Judicature Act 1964 and Malaysia is not the proper forum.

[34] I am disinclined to consider or determine this issue as this is an issue of fact. To consider this issue would involve examining disputed facts which would also go into the merits of the originating summons. For example, to determine where the cause of action itself arose will require examining, *inter alia*, the parties' correspondences which involve facts in dispute.

[35] This application is based on non-disputed facts and not based on the merits of the originating summons.

[36] Therefore, I make no finding on this issue.

Conclusion

[37] The defendant cannot be restrained from exercising its legal right to recognise and enforce the DT award. The defendant is entitled to apply to court *via* OS 49 to have the DT award recognised under s. 38 of the Arbitration Act. The merits of OS 49 have yet been determined.

[38] Similarly, the plaintiff is entitled to challenge OS 49. Whether or not the plaintiff's challenge can come under s. 39 of the Arbitration Act is no ground to prevent the defendant from even applying to have the DT award recognised.

[39] For the reasons stated above, I allowed prayers 1 and 2 of this application and having heard arguments on costs, granted costs of RM20,000 in favour of the defendant subject to allocator.